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IN THE

Supreme Court of the United States

October Term, 1959

No. 84

In the Matter of

ALBERT MARTIN COHEN,

Petitioner,

v.

DENIS M. HURLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE

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SUBJECT INDEX

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Petitioner, Albert Martin Cohen, respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of New York, affirming an order of the Appellate Division, Second Department, permanently disbarring petitioner from the practice of the law.

Citations to Opinions Below

The majority, concurring and dissenting opinions of the Appellate Division, Second Department are reported in 9 A. D. 2d 436; 195 N. Y. S. 2d 990, and are printed as Appendix A hereto, *infra*, pp. 20-43. The Appellate Division's stay of its order of disbarment pending final judg-

ment by the Court of Appeals of New York is reported in 10 A. D. 2d 581; 196 N. Y. S. 2d 277, and is printed as Appendix B hereto, *infra*, pp. 44-46. The majority and dissenting opinions of the Court of Appeals of New York are not yet officially reported and are printed as Appendix C hereto, *infra*, pp. 47-62. The Court of Appeals' remittitur to the Appellate Division is not officially reported and is printed as Appendix D hereto, *infra*, pp. 63-64. The order of disbarment, dated December 31, 1959 is printed as Appendix E hereto, *infra*, pp. 65-67).

Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 1, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

Questions Presented

Whether a state may, consistent with the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, permanently disbar an attorney in the absence of any evidence of professional misconduct or bad character, but solely because he refused, in good faith and relying on the advice of competent counsel, to answer questions before a general judicial inquiry in reliance on his privilege against self-incrimination.

Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 1, Clause 2:

> " . . . nor shall any State deprive any person of . . . liberty, or property without due process of law . . . "

Statement

On January 21, 1957, the Appellate Division, Second Department, ordered a general judicial inquiry (hereinafter called the "Inquiry") into solicitation and related practice in the County of Kings, New York (R. 23-28). From March 1957 to June 1958 the Inquiry's staff examined informally about 2,500 persons. See *Anonymous* v. *Baker*, 360 U. S. 287, 292. Subsequently, petitioner, in response to subpoenas served upon him, appeared before the Inquiry on October 28, 1958 before Mr. Justice Arkwright and on May 19, 1959 before Mr. Justice Baker (R. 29, 37).

During the course of his interrogation, petitioner was assured by the Inquiry that he had not been called as a prospective defendant or respondent (R. 30, 43); that the Inquiry was not an adversary proceeding (R. 43); and that he was not being charged with having committed any of the illegal practices with which the Inquiry was concerned (R. 42). However, he was informed by the Inquiry's interrogator that, " . . . we have information that indicates your participation in professional misconduct . . . " (R. 43), and the nature of many of the questions asked conveyed the suggestion that statements adverse to petitioner had been made by one or more of the numerous unidentified witnesses previously examined by the Inquiry's staff. Nevertheless, no evidence of petitioner's professional misconduct was ever produced, no further description of the allegedly adverse information was ever provided, and no source was ever identified. Thus, petitioner had no opportunity to confront or cross-examine his alleged accusers.

This was the character of the proceeding in which petitioner heeded his counsel's advice to invoke his constitu-

tional privilege against self-incrimination,* Indeed, under these adverse circumstances, petitioner answered a number of questions and indicated a willingness to answer more, but yielded to his counsel's admonition to refrain from doing so lest he waive his constitutional privilege. Thus, at R. 58,

> "Mr. Price: I told you not to answer. You said you wanted to answer, so go ahead and answer.
>
> The Witness: I have to take my counsel's advice. If I answer it, you said it may be deemed a waiver.
>
> Mr. Price: That is why I said make the same answer.
>
> The Witness: Well, then specifically upon my counsel's advice, the answer is the same."

It is conceded that petitioner's assertion of the privilege was neither contumacious nor contemptuous, but was in good faith (Appendix A, *infra*, p. 20).

Notwithstanding petitioner's unblemished record of thirty-seven years at the bar, respondent, the Inquiry's attorney, petitioned the Appellate Division on July 9, 1959, to discipline petitioner solely for his refusal to waive his privilege against self-incrimination by testifying (R. 7, 19).

No charges were made on the basis of the allegedly adverse evidence which respondent claimed to possess. In his brief before the Appellate Division, respondent indicated that it was cheaper and quicker to proceed as he did than to incur the "expenditure of time, energy and money" (Re-

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* In the course of the Inquiry, petitioner for the same reason refused to produce certain records demanded by a subpoena duces tecum. The issues raised by this refusal have been treated throughout these proceedings as identical to those raised by the refusal to testify.

spondent's Brief, p. 20) that would be entailed in proving a case of professional misconduct based on this alleged evidence. Accordingly, no hearing was held on the charges of professional misconduct intimated by respondent, and the sole issue before the Appellate Division was whether the uncontested fact that petitioner had refused to waive his constitutional privilege by testifying warranted disciplinary action.

Petitioner, on July 31, 1959, in his Answer to Respondent's Petition, explicitly asserted that disciplinary action would violate his rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Thus the Answer stated in part (R. 84-85):—

> "Respondent Alleges Affirmatively:—
>
> . . . that the imposition of any discipline upon respondent for asserting said privilege against self-incrimination would be a denial to him of due process in violation of his rights under . . . the 14th Amendment of the Constitution of the United States . . .
>
> "The right to practice law is a right of liberty and property protected by the Fourteenth Amendment to the Constitution of the United States."

The Appellate Division, Second Department, one justice dissenting, rejected petitioner's contention and held that his refusal to answer, even though based on his reliance in good faith and on advice of competent counsel, on his constitutional privilege against self-incrimination, constituted professional misconduct warranting permanent disbarment (Appendix A, *infra*, p. 20). The order of disbarment was entered on December 31, 1959 (Appendix E, *infra*, p. 65). On January 21, 1960, the court, expressly stating that

constitutional questions were involved in this case, granted petitioner's motion staying the disbarment order pending appeal and final determination of the issues by the Court of Appeals (Appendix B, infra, p. 44).

On April 1, 1960, the Court of Appeals, one judge dissenting, affirmed the disbarment order below, noting that petitioner had urged that he had been deprived of his rights without due process of law (Appendix C, *infra*, p. 47). On April 21, 1960, the Court of Appeals amended its remittitur to the Appellate Division, Second Department, to state (Appendix D, *infra*, p. 63):—

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: 'The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in a non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment.' The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

REASONS FOR GRANTING THE WRIT

POINT I

The question presented is similar to the question presented by *Konigsberg* v. *State Bar of California*, in which this Court recently granted certiorari.

After this Court's decision in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, the Supreme Court of California held that the California Committee of Bar Examiners was justified in refusing to recommend Konigsberg for admission to the bar solely because Konigsberg's refusal to answer the Committee's questions "revealed a lack of candor which constituted unfitness". 52 Cal. 2d 769; 344 P. 2d 777. This Court again granted certiorari on March 7, 1960 so that it might determine whether the action taken deprived Konigsberg of liberty and property without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution (362 U. S. 910). Here the Court below affirmed the disbarment of petitioner solely on the ground that his refusal to answer the questions put in a general judicial inquiry breached his duty to "be candid and frank with the court at all times" (App. C).

Thus in *Konigsberg* v. *State Bar of California*, 52 Cal. 2d 769, 344 P. 2d 777, the court below held that a refusal to answer, disqualified an applicant for admission to the Bar, whereas here the court below held that a refusal to answer is a *per se* disqualification to continue the practice of the law by one already admitted. However worthy an attorney may be, however unassailable his character, the

California and New York courts would deny him membership in the Bar solely for refusing to answer questions put to him, in reliance upon Constitutional guarantees against self-incrimination.

To be sure, there are differences between *Konigsberg* v. *State Bar of California, supra*, and the instant case, but none detracts from the importance of the issue presented here. Indeed, the differences are all in the direction of greater importance here. Whereas Konigsberg was denied admission to the bar, petitioner was disbarred after thirty-seven years of practice, during which time his integrity was never questioned. As the Court of Appeals for the District of Columbia Circuit said in, *In Re: Carter*, 177 F. 2d 75, 78; *cert. denied*, 338 U. S. 900:

> "An applicant for admission to the bar must satisfy the authorities as to his moral character, and custom has established confidential inquiry as an element of that procedure. But when he has been admitted, his removal from practice is a disbarment, about which elaborate procedural requirements are thrown. Such removal after admission is not a mere denial of an application for admission. The same is true in respect of licenses to do business in many forms. Prior to grant, many processes are available for inquiry and information. But, once granted, the license becomes a right, and due process of law must be followed to achieve deprivation."

If there is an important federal question presented by the denial of Konigsberg's application for admission to the bar, *a fortiori* the question presented by petitioner's disbarment is vitally important.

The cases also differ on the ground relied upon as justification for refusing to answer. Konigsberg refused to answer on the ground that the inquiries infringed rights guaranteed him by the First and Fourteenth Amendments; petitioner on the ground that his answers might tend to incriminate him. This difference, too, merely serves to emphasize the importance of the question presented here. If it is vital to determine whether a state denies due process of law when it closes the bar to an applicant who refuses to answer for a reason not yet held privileged, how much more important it is to determine whether a state denies due process of law when it disbars for a concededly privileged refusal to answer.

The cases differ in one more respect. Konigsberg's refusal occurred in the course of a hearing, the only purpose of which was to pass on Konigsberg's qualifications for admission to the bar. Petitioner's refusal occurred during a general inquiry to which he was not a party.

The potential impact of the decision of the court below is thus much greater than that of the California court's decision. It would seem, for example, to extend to an attorney's refusal to give evidence before a grand jury.

POINT II

The Court below has resolved the question presented in a way that is inconsistent in principle with decisions of this Court.

It has long been established that the right to practice a profession or to pursue a particular line of private employment is entitled to constitutional protection and may not be taken away except by a proceeding that comports with all

the essentials of procedural due process. E.g., *Ex parte Robinson*, 86 U. S. 505, 512; *Ex parte Garland*, 71 U. S. 339, 379; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *Parker* v. *Lester*, 227 F. 2d 708, 717 (9th Cir.); *Matter of Los Angeles County Pioneer Society*, 217 F. 2d 190 (9th Cir.); *In Re: Carter*, 177 F. 2d 75, 78 (D. C. Cir.) *cert. denied* 338 U. S. 900; *In Re: Carter*, 192 F. 2d 15, 17 (D. C. Cir.) *cert. denied* 342 U. S. 862; *Laughlin* v. *Wheat*, 95 F. 2d 101 (D. C. Cir.); *United States* v. *Hicks*, 37 F. 2d 289 (9th Cir.); cf. *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238.

These cases make it clear that the mandate of due process requires a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted to confront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation. Consequently, if, in the absence of the judicial inquiry, respondent had sought to have petitioner disbarred, he would have been obliged to make specific charges of professional misconduct, present evidence in support of those charges, permit petitioner to cross-examine witnesses and present evidence of his own, and, finally, respondent would have had to sustain the burden of proving the charges.

Instead respondent employed a procedural short-cut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry* that was

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* The inquiry was a "preliminary inquisition, without adversary parties". *Anonymous* v. *Baker*, 360 U. S. 287, 291.

plainly intended to present petitioner with a Hobson's choice. Without providing petitioner with any specific charges, indeed without warning him at all that he would be called upon to defend himself and after informing petitioner that he had not been summoned in the role of a prospective defendant, respondent proceeded to question petitioner in a way that clearly belied this disclaimer. Eventually respondent went so far as to inform petitioner that the Inquiry had information indicating professional misconduct on his part. But no such information was presented and petitioner was left in the dark as to the source of the information, its nature, and whether any steps had been taken to test its credibility. Petitioner was thus given the option of meeting an undisclosed case against him or of following the dictates of prudence and asserting his privilege against self-incrimination. When he naturally followed the advice of his attorney to take the latter course, respondent seized upon this as a substitute for an affirmative demonstration that petitioner had been guilty of professional misconduct and instituted disbarment proceedings.

If the judgment below is permitted to stand, it will serve as a model for those who would evade constitutional safeguards which this Court has been at great pains to preserve. The new procedure will be simply: summon the person whose license to practice law—or any other license for that matter—is sought to be revoked; make vague threats about possessing adverse information so that the target will be moved to assert his privilege against self-incrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against the intended

victim can safely be avoided. That this is not an overdrawn picture of what occurred below is best indicated by respondent's statement in his brief before the Appellate Division that it was cheaper and quicker to proceed in this manner than to incur the "expenditure of time, energy and money" that would be necessary to make a case of professional misconduct against petitioner.

In dissent in the Appellate Division, Mr. Justice Kleinfeld indicated his belief that the course followed in this case denied petitioner due process of law. He said:

> "If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accuser, cross-examine witnesses, call witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems proper. Absent such proceedings, the respondent has been denied his rights under the constitution of this state and of the United States."

And Mr. Justice Frankfurter's statement in his concurring opinion in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 249, seems precisely in point:

> "Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here."

POINT III

The decision below conflicts with recent decisions of the Supreme Court of Florida.

In *Sheiner* v. *Florida*, 82 So. 2d 657, the Supreme Court of Florida reversed a judgment of disbarment based solely on an attorney's refusal to answer questions on the ground that the answers might tend to incriminate him. The court held that to disbar an attorney for refusing to answer because of his privilege would deprive him of due process of law. The court thus stated (82 So. 2d, at 661):—

> "The last cited case [*Matter of Murchison*, 349 U. S. 133] and the Peters Case [*Peters* v. *Hobby*, 349 U. S. 331] are pertinent here for the emphasis they place on confrontation, cross-examination and fair trial as ingredients of due process. Confrontation and cross-examination under oath are essential to due process because it is the means recognized by which we test the probity of the evidence and eliminate that which is trumped up or of doubtful veracity. The 'faceless informer' theory of proof should never be substituted for confrontation and cross-examination in a trial where the end result is to deprive the accused of one of his most precious assets—the privilege to practice law."

Subsequently, the same court rejected efforts to amend the rules dealing with the practice of law in Florida to permit disbarment for invoking the privilege against self-incrimination. It held that since the innocent may invoke this privilege, "its exercise may not be considered a breach of duty to the court". *In Re: The Integration Rule of the Florida Bar*, 103 So. 2d 873, 875. The Court therein relied on this Court's opinions in *Konigsberg* v. *State Bar of Cali-*

fornia, 353 U. S. 252; *Ullmann* v. *United States*, 350 U. S. 422; and *Slochower* v. *Board of Education*, 350 U. S. 551. See also *Quinn* v. *United States*, 349 U. S. 155.

Significantly, on May 29, 1959, after considering the application of this Court's decisions in *Lerner* v. *Casey*, 357 U. S. 468 and *Beilan* v. *Board of Education*, 357 U. S. 399,* upon which the courts below relied heavily, the Supreme Court of Florida reaffirmed its decision in the earlier *Sheiner* case to frustrate another attempt to disbar Sheiner for his invocation of the privilege. *Florida* v. *Sheiner*, 112 So. 2d 573. Cf. *In Re: Holland*, 377 Ill. 346, 36 N. E. 2d 543, where the Supreme Court of Illinois held on state grounds that the suspension of an attorney for assertion of the privilege constituted error.

The position of the Supreme Court of Florida stands as the direct antithesis of, and in square conflict with, that of the Court of Appeals of New York in the instant case. It is just impossible to reconcile the two decisions.

POINT IV

This Court has been persistently receptive to cases in which bar authorities have deprived attorneys or applicants of their rights.

This Court has repeatedly demonstrated its concern with the question of fairness in the admission and exclusion of members of the bar by granting writs of certiorari in such cases. E.g., *Konigsberg* v. *State Bar of California*, 353 U. S. 252, *cert. regranted*, March 7, 1960, 362 U. S. 910;

* Prior to its final decision, the Supreme Court of Florida, on July 24, 1958, had ordered further argument limited to the application of *Beilan* and *Lerner*.

Schware v. *Board of Bar Examiners*, 353 U. S. 232; *Application of Levy*, 348 U. S. 978, *summarily reversing* 214 F. 2d 331 (5th Cir.); *In Re: Summers*, 325 U. S. 561, Cf. *Ex parte Garland*, 71 U. S. 339; *Ex parte Robinson*, 86 U. S. 505.

That concern is most appropriate. History is replete with the names of intrepid attorneys who have championed causes which at the time were unpopular in order to perpetuate the cause of freedom and democracy. The nation must be assured that,

> "... the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself". *Ex parte Secomb*, 19 How. (U. S. 9).

As this Court stated in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 273:

> "... A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers are unintimidated—free to think, speak, and act as members of an Independent Bar."

See also *Cammer* v. *United States*, 350 U. S. 399, 406-407.

POINT V

The question presented has not been resolved by this Court's decisions in cases involving public employees.

The court below relied in part upon this Court's decisions in *Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Nelson and Globe* v. *County of Los Angeles*, 362 U. S. 1, decided February 29, 1960. The

import of these cases, all decided by a sharply divided court, is, that a state may constitutionally discipline a public employee paid by public funds for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination.

That these cases do not foreclose the question presented is most clearly indicated by this Court's later grant of certiorari in *Konigsberg* v. *State Bar of California*, 362 U. S. 910, after the California Supreme Court (52 Cal. 2nd 769) relied upon precisely the same line of authority relied upon by the courts below, viz the *Lerner* and *Beilan* cases.

Moreover, this Court has never suggested that a state possesses the same power over private citizens that it does over public employees. Quite the contrary, the difference between the two has long been recognized. For example, in *Ex parte Garland*, 71 U. S. 339, 378, this Court said:

> "The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution."

In *Parker* v. *Lester*, 227 F. 2d 708, the Court of Appeals for the Ninth Circuit, in holding unconstitutional a security program which summarily prevented merchant seamen from carrying on their vocation, stated (222 F. 2d, at p. 717):

> "The liberty to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job . . . The plain-

> tiffs here are citizens of the United States and the rights and liberties which they assert relate not to any public employment present or prospective, but to their right to pursue their chosen vocations as merchant seamen."

Indeed, this Court in *Cammer* v. *United States*, 350 U. S. 399, 406-407, quoted with approval the statement that an attorney has as good a right to the exercise of his profession,

> ". . . as the mechanic has to follow his trade, or the merchant to engage in the pursuits of commerce . . . The public have almost as deep an interest in the independence of the bar as of the bench."

Nor does an attorney's role as an officer of the court make him the equivalent of a public servant. In the *Cammer* case (350 U. S. at 405) this Court pointed out that, unlike other court officers such as marshals, bailiffs or clerks,

> ". . . a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business."

Surely *United Public Workers* v. *Mitchell*, 330 U. S. 75, demonstrates the distinctive status of public employees. Although that case held that the United States may constitutionally discharge an employee for taking an active part in political activities, there can be no doubt that it would be unconstitutional to disbar an attorney for the same reason.

POINT VI

There are 38 attorneys whose right to practice will effectively be determined by the outcome of this case and numberless attorneys and others who will one day feel its impact.

Petitioner is not the only attorney who was sufficiently intimidated by the Inquiry to assert his privilege against self-incrimination. There were some 38 others (Respondent's Brief before Appellate Division, p. 20). This petition then, although the petition of but one attorney, vitally affects the professional status of many.

But even if petitioner stood alone today, there can be no doubt that the principle established by the judgment below will create plenty of company for him tomorrow. On the narrowest construction of the opinion below, any attorney who refuses to answer questions in reliance on his privilege against self-incrimination in the course of an inquiry into professional activities will hereafter be subject to disbarment. And it may be that the court below meant to inform the bar that any member will lose his right to practice if he relies upon his privilege against self-incrimination no matter what the nature of the proceeding. Indeed, the court below did not even limit its proscription of refusals to those based upon the privilege against self-incrimination.

Whatever the precise scope of the holding below, it is plain that if it is permitted to stand, we can look forward to the day when states will seek to deny and revoke licenses in all sorts of occupations because licensees have refused to cooperate with inquiries looking into matters relevant to the licensed occupation. In this connection, it is worth

remembering the enormous range of state licensing activities. Are the livelihoods of physicians, bail bondsmen, hair dressers, morticians, restaurant owners, taxicab drivers and many, many others all to be constitutionally vulnerable to the kind of arbitrary treatment petitioner has received? If certiorari is granted in this case, it is to be hoped that this Court will never again have to decide that question.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinions of Appellate Division, Second Department

Supreme Court, Appellate Division, Second Department.

Dec. 31, 1959.

In re ALBERT MARTIN COHEN, an Attorney, Respondent.
Denis M. Hurley, Petitioner.

BELDOCK, Justice.

More than 40 years ago the eminent jurist, Chief Judge Cardozo, declared: "Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards * * *. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment" (Matter of Rouss, 221 N. Y. 81, 84-85, 116 N. E. 782, 783).

On the ground that respondent, a member of the Bar since 1922, by his conduct has broken *the condition*, this proceeding is brought to declare that he has lost *the privilege* of membership in the Bar.

Appendix A—Opinions of Appellate Division, Second Department

The genesis of this proceeding is a judicial inquiry undertaken by direction of this court. Advised by the Brooklyn Bar Association's petition (presented after its own investigation) of serious abuses and unethical practices by attorneys in Kings County with respect to their procurement of negligence cases on a contingent basis and with respect to their prosecution of such cases, this court in the exercise of its inherent and statutory power and duty (N. Y. Const. Art. VI, § 2; Judiciary Law, § 90; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851), ordered a judicial inquiry. The inquiry was ordered with respect to the alleged illegal, corrupt and unethical practices and with respect to the alleged conduct prejudicial to the administration of justice by attorneys and others acting in concert with them, in Kings County. The purpose of the inquiry is to expose all the evil practices with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them.

The existing conditions in Kings County as a result of the abuses in the handling of negligence cases by attorneys is well portrayed by Chief Judge Cardozo in his summary of the causes leading to the 1928 "ambulance chasing" investigation (People ex rel. Karlin v. Culkin, supra, 248 N. Y. at page 468, 162 N. E. at page 488). Unfortunately, the evils of yesterday have returned to plague us today.

In fairness and in justice to the legal profession, however, we state at the outset that the number of lawyers who appear to be involved in the alleged unethical practices is

minute in relation to the total number of honorable practitioners at the Bar in Kings County.

During the period 1954 to 1958 inclusive, pursuant to the rules of this court, the respondent, who apparently specialized in negligence cases, filed 228 statements as to retainer in his own name and 76 such statements in a firm name, thus indicating that he and his firm had been retained on a contingent basis in a total of 304 negligence cases. He was duly subpoenaed to testify and to produce his records with respect to such cases before the Justice designated by this court to conduct this judicial inquiry at an additional Special Term. On the advice of counsel, respondent invoked his constitutional privilege against self incrimination and refused on that ground to answer pertinent questions and to produce his records.

It is not disputed that respondent has asserted his constitutional privilege in good faith. Nor is it disputed that the questions put and the records sought come within the scope of the inquiry and that the information sought to be elicited would be relevant. Indeed, these facts are virtually conceded by the parties to this proceeding.

The petition now presented to the court seeks to discipline respondent, not on the ground that he has asserted his constitutional privilege, but on the ground that his refusal to answer relevant questions and his refusal to produce relevant records "are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession", in that such refusals (a) are "contrary to the standards of candor and frankness that are

required * * * of a lawyer to the Court", (b) are "in defiance of and flaunt [flout] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer", (c) have "hindered and impeded the Judicial Inquiry" which had been ordered by this court, and (d) have resulted in respondent's withholding "vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession".

Thus, the sole question for our determination is whether the respondent, by reason of his refusal to answer relevant questions and to produce relevant records, may be disciplined as a lawyer, or, stated differently, does his constitutional privilege against self incrimination shield him, not only from possible criminal prosecution, but also from disciplinary action as a member of the Bar for failing in his duties, obligations and responsibilities as a lawyer to the court?

This question goes to the heart of a serious and far-reaching problem confronting the Bar, the courts and the public. When this question is finally resolved it will affect the standing at the Bar, not only of this respondent, but of many other lawyers who similarly have asserted their constitutional privilege against self incrimination as a basis for refusing to divulge pertinent information with respect to their practices in relation to negligence cases. The resolution of this question will also determine in large measure whether this court's supervisory and regulatory power over lawyers, and whether this court's plenary power to curb all evil and unethical practices in the profession of the law,

are to be suppressed and subverted, and whether this court is to be rendered impotent in the performance of its inherent and statutory duties relating to attorneys and to the administration of justice.

[1, 2] In order to keep in proper perspective the precise question to be decided here, it should be emphasized that with respect to the members of the Bar collectively, this court has the positive affirmative duty, springing both from its ancient plenary jurisdiction over attorneys and from the express statutory delegation of such power, "to keep the house of the law in order", to compel attorneys "to submit to an inquisition as to professional misconduct", to ascertain the existence of practices which are prejudicial to the administration of justice, to compel the discontinuance of such practices and to discipline those attorneys who may have engaged in them. For the achievement of these ends this court is empowered to make any rule, to hold any inquisition, and to require any attorney to attend and to give evidence under oath. The end and the aim of the inquisition are not punishment, but discipline. And every attorney, as an officer of the court, has the reciprocal duty to aid the court, to co-operate with it, to obey its rules and orders, to respond to all relevant questions put by the court or by the agency conducting the inquiry on its behalf, and to refrain from doing any act which might thwart the inquiry (Judiciary Law, § 90; Gair v. Peck, 6 N. Y. 2d 97, 111, 188 N. Y. S. 2d 491, 501; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470-479, 162 N. E. 487, 489, 492, supra; Queens County Bar Ass'n v. Dwyer, 254 App. Div. 769, 4 N. Y. S. 2d 895; Matter of Cherry, 228 App. Div. 458, 464-465, 240

N. Y. S. 282, 289-290; Matter of Brooklyn Bar Ass'n, 223 App. Div. 149, 151-153, 227 N. Y. S. 666, 669-671; Matter of Bar Ass'n of City of New York, 222 App. Div. 580, 584-587, 227 N. Y. S. 1; Matter of Flannery, 150 App. Div. 369, 371, 135 N. Y. S. 612, 614, affirmed 212 N. Y. 610, 106 N. E. 630).

[3, 4] And with respect to any particular member of the Bar, whenever the occasion demands or whenever his character and fitness are called into question, this court likewise has the positive affirmative duty to re-examine into them and to ascertain whether he *still possesses* the requisite character and fitness to continue to be a member of the Bar. If it finds that he does not, it must disbar him—not by way of punishment, but "for the protection of both the court and the public * * * from the official ministration of persons unfit to practice." An attorney may continue in the practice of the law only so long as he continues in the possession of the requisite character and fitness (Judiciary Law, § 90; In re Thatcher, C.C., 190 F. 969, 975-977; Matter of Donegan, 265 App. Div. 774, 787-788, 41 N. Y. S. 2d 37, 47, 48; Matter of Rouss, 221 N. Y. 81, 84-85, 116 N. E. 782, supra; In re Durant, 80 Conn. 140, 147, 67 A. 497).

We disagree with respondent in his contention that the purpose of this proceeding is to discipline him "because he has invoked his constitutional privilege against self-incrimination." Respondent urges, in effect, that his rights as a citizen to be free from punishment for invoking his constitutional privilege are being destroyed if, in his

capacity as a lawyer, he may be disciplined for resorting to such privilege as a citizen. But his argument overlooks the undeniable fact that respondent, with respect to his rights as a citizen and with respect to his obligations as a lawyer, stands in a dual position.

[5, 6] We agree that respondent's rights as a citizen may not be withheld or impaired in a disciplinary proceeding. No person, layman or lawyer, may be compelled to give testimony against himself if, in good faith, he claims that such testimony may tend to incriminate him. Nor may any person, layman or lawyer, be compelled to sign a waiver of immunity from future criminal prosecution. And no inference of guilt or misconduct may be drawn from the exercise of such a constitutional privilege. In any inquiry, investigation, trial or proceeding the respondent has every right to assert his constitutional privilege in response to any question, whether it deals with his professional acts as a lawyer or otherwise. And he cannot be disbarred for his assertion in good faith of his constitutional privilege. These principles have been well established by our highest courts and we abide by them.

However, we are not dealing here with an attempt to force respondent to testify despite his assertion of his constitutional privilege against self incrimination or his refusal to sign a waiver of immunity. This is not a typical "Fifth Amendment" case. No action is sought to be taken against respondent because of his beliefs, his affiliations with subversive groups, or any specific act of doubtful propriety. The judicial inquiry here deals generally and essen-

tially with the procurement and the prosecution of negligence cases, and the questions put to respondent relate only to his practices with respect to the 304 statements as to retainer filed by him and his firm and with respect to the negligence cases which they embrace.

Hence, there is involved here only the question of whether respondent in his capacity as a lawyer may be absolved from all his duties, responsibilities and obligations to the Bar and to the court to help expose and uproot evil practices and corruption at the Bar and in the courts with respect to negligence cases. If, as it has been often held, disbarment is not criminal punishment, then by asserting his constitutional privilege against self incrimination and thus gaining immunity from criminal prosecution or *punishment*, is the respondent free to flout and destroy the basic relationship between the lawyer and the court? Can he, with impunity, disregard the canons of ethics and cast to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and candid with the court? Can he negate his duty to co-operate with this court to expose the evil and unethical practices at the Bar and in the courts? Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? We say, emphatically no.

This court already has expressed its opinion upon the basic question here posed, namely, whether the attorney's right as a citizen to assert his constitutional privilege against self incrimination, suspends his duty as an attorney

and officer of the court to aid the court in its judicial inquiry into unethical practices.

In 1940, in Matter of Ellis, 258 App. Div. 558, 565-566, 17 N. Y. S. 2d 800, 807, 808, and in Matter of Grae, 258 App. Div. 576, 17 N. Y. S. 2d 822, a majority of this court, after reviewing the authorities, announced this court's view and future policy with respect to attorneys who assert their constitutional privileges as a ground for refusing to divulge pertinent information upon a judicial inquiry. Such view and policy were stated as follows (258 App. Div. at page 566, 17 N. Y. S. 2d at page 808): "If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer the court's questions on the ground that his answers would tend to incriminate or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred."

In adherence to such policy this court suspended Ellis and Grae from the practice of law. But it did so on two separate and distinct grounds, namely: (1) that their assertion of their constitutional privilege against self incrimination does not excuse their refusal to testify and to divulge pertinent information; and (2) that their insistence upon retaining their constitutional privilege of immunity from prosecution and declining to sign a written waiver of such immunity, impeded the investigation and constituted conduct prejudicial to the administration of justice.

Thereafter, in both the Ellis and Grae cases, the Court of Appeals reversed the orders of this Court (Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963, 127 A. L. R. 1276; Matter of Ellis, 282 N. Y. 435, 26 N. E. 2d 967). Such reversal, however, was based solely on the second ground stated. It was held that the attorneys' refusal to yield their constitutional immunity from criminal prosecution in advance of their testimony and as a condition to permitting them to testify at the judicial inquiry, did not impede the inquiry and is not professional misconduct. This conclusion rested on the express finding of the Court of Appeals that attorneys Grae and Ellis, time and again, had evinced their willingness to co-operate, to testify fully and frankly and to make all their records available if they were not deprived in advance of their constitutional immunity from criminal prosecution by reason of their proffered testimony. The question as to the right of an attorney to refuse to testify in reliance on his constitutional privilege against self incrimination was not reached by the Court of Appeals. Obviously, the consideration of that question became unnecessary because, as stated, both Ellis and Grae were perfectly willing to co-operate with the inquiry and to divulge all relevant information if they had been permitted to retain their constitutional immunity against future criminal prosecution.

Hence, while this court already has taken the unequivocal position that upon a judicial inquiry an attorney, by the assertion of his constitutional privilege against self incrimination cannot avoid his obligation as a member of the Bar and as an officer of the court to divulge all relevant

information in his possession, the Court of Appeals has not yet definitively passed upon the precise question.

In the light of the respective duties of court and attorney and in the light of recent decisions, we have now re-examined this court's position as expressed in the Grae and Ellis cases, supra, insofar as it relates to the effect of an attorney's assertion of his constitutional privilege against self incrimination. After such re-examination we have no hesitancy in affirming such position, limiting it however to the effect of the plea against self incrimination. When so limited, the position of this court is not inconsistent with the position taken by the Court of Appeals in the Grae and Ellis cases, supra, since, as already stated, in those cases the Court of Appeals held only that a waiver of immunity from future criminal prosecution may not be exacted from an attorney as a condition to permitting him to testify in a judicial inquiry.

The highly responsible, and at the same time delicate, position of the lawyer in our society has been well described by Mr. Justice Frankfurter (Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232, 247, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796):

> "Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under

the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' • • • in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'"

Mr. Justice Frankfurter also pointed out (353 U. S. at pages 248-249, 77 S. Ct. at page 761) that it is this "moral character" which "has been the historic unquestioned prerequisite of fitness" to be a member of the Bar, and that to "a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts".

It is fair to say, in view of the fiduciary responsibility entrusted to the lawyer, that the corruption or deterioration of his moral character would undermine the administration of justice and thus endanger the security of the State itself. As so aptly said by Chief Justice Charles Evans Hughes, the practice of the profession of the law is "'• • • the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed, and the very basis of civilization is made secure'" (Matter of Williams, D. C., 158 F. Supp. 279, 280).

The courts, and the lawyers as integral functionaries and officers of the court, are the foundation upon which the administration of justice must rest. And, it has been oft repeated, the true administration of justice is the firmest pillar of good government. It is for these reasons, as indicated by the cited cases, that the courts from time immemorial have exercised plenary and summary jurisdiction over attorneys, have required them collectively and individually to conform to the highest standards of rectitude and have swiftly disciplined them for any departure from such standards.

[7] When the position of any person is one of trust and responsibility, one which directly affects the public interest or the security of the State, and one which consequently requires a high degree of moral character and fitness, such person may be removed from his position if he elects to assert his constitutional privilege against self incrimination as a basis for his refusal to answer relevant questions which seek to determine whether he still possesses such character and fitness. So the courts recently have held as to a teacher, a subway conductor and a policeman (Beilan v. Board of Public Education, 357 U. S. 399, 78 S. Ct. 1317, 2 L. Ed. 2d 1414; Lerner v. Casey, 357 U. S. 468, 78 S. Ct. 1311, 2 L. Ed. 1423, affirming 2 N. Y. 2d 355, 161 N. Y. S. 2d 7, affirming 2 A. D. 2d 1, 154 N. Y. S. 2d 461 [2d Dept.]; Matter of Delehanty, 280 App. Div. 542, 115 N. Y. S. 2d 614, affirmed 304 N. Y. 725, 108 N. E. 2d 46; Christal v. Police Commission of San Francisco, 33 Cal. App. 2d 564, 92 P. 2d 416).

It is true that in the four cases last cited there was a special statute which in effect made compulsory the em-

ployee's maintenance of such character and fitness and which permitted his discharge when the administrative agency by which he was employed determined after a hearing that he lacked the requisite character and fitness or that a reasonable doubt exists whether he does. But the principle on which they were all decided is the same, namely: that while the employee is entitled to refuse to answer any relevant question on the ground that his answer might tend to incriminate him, nevertheless, by reason of his refusal to divulge the relevant information sought, the agency was justified in concluding that he lacked the requisite character and fitness and in removing him from his position. The rationale is, not that he is being punished for invoking his constitutional privilege, but rather that he is being removed from his position because the agency, by reason of his refusal to furnish the information sought, is entitled to conclude that he no longer possesses the requisite character and fitness to continue in the agency's employ.

Of course, no statute is needed to prescribe the high moral character at all times requisite for the lawyer or to define his obligation to the court or his duty to promote the administration of justice and never to impede it. As indicated by the cited cases, such character, obligation and duty are implicit and fundamental; they have been the prerequisites of the office of an attorney and counselor at law from time immemorial, and without them the true administration of justice could not long survive.

[8] But since the high standard of conduct to which the lawyer must conform is incapable of precise definition the Legislature has wisely confided to this court a plenary

power and control over all lawyers (Judiciary Law, § 90, subd. 2; Gair v. Peck, 6 N. Y. 2d 97, 188 N. Y. S. 2d 491, supra; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra; Matter of Brooklyn Bar Ass'n of City of New York, 223 App. Div. 149, 227 N. Y. S. 666, supra). And, as observed some years ago by the Court of Appeals: "In establishing the standard of conduct to which the bar must, at its peril, conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere" (Matter of Flannery, 212 N. Y. 610, 611, 106 N. E. 630, supra).

Respondent relies on several cases (to wit, Matter of Grae, 282 N. Y. 428, 26 N. E. 2d 963, supra; Matter of Ellis, 282 N. Y. 435, 26 N. E. 2d 967, supra, Matter of Kaffenburgh, 188 N. Y. 49, 52-53, 80 N. E. 570, 571; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra) as upholding the attorney's right to immunity from disbarment by reason of his assertion of his constitutional privilege against self incrimination. In our opinion, none of them so holds, as will be indicated below. Moreover, as already noted, the real question to be determined here is, not whether the attorney is immune from disbarment by reason of his assertion of his constitutional privilege, but whether the attorney is immune from disbarment by reason of his refusal to co-operate with the court in a judicial inquiry into unethical practices and by reason or his refusal to come forward with an explanation of his conduct when the circumstances require it.

In the Grae and Ellis cases (supra), the Court of Appeals, as previously noted, settled and decided only one

proposition, namely, that an attorney who is willing to testify in a judicial inquiry but who is unwilling, in advance of his testimony and as a condition to permitting him to testify, to sign a waiver of immunity from future criminal prosecution, is not subject to discipline by this court by reason of his refusal to sign such waiver. Indeed, this holding is consistent with our own prior holding (cf. Matter of Solovei, 250 App. Div. 117, 293 N. Y. S. 649, affirmed 276 N. Y. 647, 12 N. E. 2d 802), as well as with our holding in the instant case.

In the Kaffenburgh case, 188 N. Y. 49, 52-53, 80 N. E. 570, 571, supra, the Court of Appeals held only that an attorney could not be disbarred because on the trial of his former employer upon an indictment for conspiracy to defraud, the attorney who had appeared as a witness had invoked his constitutional and statutory privilege against self incrimination and refused to answer relevant questions. That case did not involve the refusal of an attorney to divulge information upon a judicial inquiry, such as the one here.

In the Karlin case 248 N. Y. 465, 162 N. E. 487, 489, supra, during the course of a judicial inquiry such as the one here, the attorney appeared in court but refused to be sworn or to testify as to his conduct in the procurement of retainers. The Court of Appeals, in an opinion by Cardozo, Ch. J., held that he had been properly held in contempt for his refusal. The only point it decided was that the attorney could not thus defy the inquiry and thwart its purpose by refusing to testify as to what he knows about the evil practices in the profession. Incidentally, the court also indi-

cated that his testimony would be "subject to his claim of privilege if the answer will expose him to punishment for crime". But the only inference to be drawn from this remark is that if he did testify in the judicial inquiry he could claim his privilege against self incrimination without fear of being held again in contempt and without fear of future criminal prosecution. The remark had no relation to the question of whether or not the attorney, if he should assert his constitutional privilege in good faith, could thereafter be disciplined or disbarred as an attorney because of his refusal to divulge relevant information sought in the judicial inquiry. That this is so is made quite plain by the sharp distinction which Chief Judge Cardozo himself drew between a criminal and a disciplinary proceeding. He pointed out that:

> "The grand jury inquires into crimes with a view to punishment or correction through the sanctions of the criminal law. There are, however, many forms of professional misconduct that do not amount to crimes. Even when they do, disbarment is not punishment within the meaning of the criminal law. * * * *Inquisition by the court with a view to the discipline of its officers is more than a superfluous duplication of inquisition by the grand jury with a view to punishment of criminals. The two fields of action are diverse and independent*". (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, 162 N. E. 487, 489 [emphasis supplied].)

This conclusion as to the holding in the Karlin case, supra, also finds ample support in the opinion of the Court of Appeals in a subsequent case (Matter of Levy, 255 N. Y.

223, 225, 174 N. E. 461, 462). In the Levy case, the Appellate Division in the First Department had disbarred an attorney because it found that upon a judicial inquiry, similar to the one here involved, he had pleaded his constitutional privilege in *bad faith*. The Court of Appeals dismissed the appeal on the ground that the constitutional privilege is not available when it is urged in bad faith and, hence, no question of constitutional construction is properly before the Court of Appeals. It then, apparently, went out of its way, however, to state (255 N. Y. at page 225, 174 N. E. at page 462) that it would "pass as unnecessary for consideration at this time the question whether the assertion in good faith [upon a preliminary judicial inquiry] of the privilege against self-incrimination is ground for disbarment."

It will be noted that the Levy case was decided two years after the Karlin case, that the same judicial inquiry was involved in both cases, that the opinion in the Levy case cites the Karlin case, and that, notwithstanding the Karlin case, the Court of Appeals in the Levy case clearly indicated that the issue here involved is still an open one and would be decided by the Court of Appeals only when it became necessary to do so and when it is properly presented.

It is also significant that the statutes granting a witness immunity from prosecution or from any penalty or forfeiture when he is compelled to answer despite the assertion of his constitutional privilege against self incrimination, are not deemed to include disbarment. Such immunity statutes do not include disbarment because they are ordinarily "designed to give an immunity as broad as the

constitutional privilege, and no broader", because the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, and because a proceeding looking to disbarment is not a criminal case or a penalty or forfeiture (Matter of Rouss, 221 N. Y. 81, 86, 116 N. E. 782, 784, supra; People ex rel. Karlin v. Culkin, 248 N. Y. 465, 470, 475, 162 N. E. 487, 489, 491, supra; Matter of Solovei, 250 App. Div. 117, 121, 293 N. Y. S. 640, 645, affirmed 276 N. Y. 647, 12 N. E. 2d 802, supra).

[9] In view of (a) the high standard of character and morality required of the attorney as a condition both to his admission and *to his retention* in the fellowship of the Bar, (b) the close fiduciary relationship between him and the court, (c) his solemn duty to uphold the integrity of the courts and the Bar and to promote the administration of justice, (d) this court's plenary power and control over him in his capacity as an attorney and counselor at law, (e) the fact that, for good cause shown, this court has initiated a judicial inquiry into unethical practices of attorneys in relation primarily to negligence cases, and (f) the fact that in the course of such inquiry it appeared that the respondent and his firm filed a large number of statements as to retainer (an average of more than 60 a year during the five-year period from 1954 to 1958) for such negligence cases, we say that upon interrogation by the court or its agency there is cast upon him as an officer of the court the affirmative duty to come forward with a full and adequate explanation of every such retainer and to thus re-establish his high moral character.

This conclusion also necessarily flows from the fact that to the extent of respondent's examination before this judicial inquiry, such inquiry inevitably became a preliminary inquiry *pro tanto* into his personal practices for the purpose of determining whether he had engaged in unethical conduct and for the purpose of determining whether he still possessed the high moral character requisite for a member of the Bar.

[10] We repeat: every attorney has an absolute right to assert his constitutional privilege against self incrimination as the basis for his refusal to give any explanation of his conduct or his activities, and when he does so he cannot be compelled to testify. But the moment he asserts his constitutional privilege he creates his own dilemma. Thereupon, after opportunity for reflection (which was here given to the respondent), it is for the attorney to choose whether he will rest upon his constitutional privilege or whether he will discharge his duty to co-operate with the court in its judicial inquiry into unethical practices. If, as here, he deliberately elects not to co-operate with the court, then the court has no alternative but to revoke his privilege to continue as a member of the Bar. For his duty to the court is inviolable. He cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry into unethical practices, and yet be permitted to retain his privilege of membership in an honorable profession.

[11] Such membership, it should be emphasized, is a *revocable* privilege. "There is no vested right in an indi-

vidual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice" (Vinson, Ch.J., In re Isserman, 345 U. S. 286, 289, 73 S. Ct. 676, 677, 97 L. Ed. 1013). We should be ever mindful of the admonition of Mr. Justice Brandeis that "If we desire respect for the law, we must first make the law respectable" (Lief, The Brandeis Guide to the Modern World, p. 166).

[12] To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to cooperate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar.

As Chief Judge Cardozo pointed out in the Karlin case (supra), 248 N. Y. at page 473, 162 N. E. at page 490), the court will make "short shrift" of such a lawyer; it will promptly strike his name from the roll of attorneys and deprive him of his privilege to practice. And, as indicated, such deprivation or such disbarment is not deemed to be punishment, but discipline which the court was always empowered to administer (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, supra; Judiciary Law, § 90, subd. 2).

Respondent should be disbarred and his name should be ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

Respondent disbarred and his name ordered to be struck from the roll of attorneys, with leave to apply to vacate the order to be entered hereon upon proof that, within 30 days after the entry thereof, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

WENZEL and UGHETTA, JJ., concur.

NOLAN, Presiding Justice (concurring).

If this were a matter of first impression, I would favor a determination in accordance with the views expressed in the dissenting opinion of Presiding Justice Lazansky in Matter of Ellis, 258 App. Div. 558, 567-575, 17 N. Y. S. 2d 800, 809-816. However, the precise question presented here was decided by this court in that proceeding contrary to the views expressed by the Presiding Justice, and that decision was not affected by the reversal in the Court of Appeals of our determination made at the same time that the failure by the respondent in that proceeding to sign a waiver of immunity constituted professional misconduct. Consequently, I concur in the result.

KLEINFELD, Justice (dissenting)

Despite all disclaimers to the contrary, respondent is being disbarred for pleading his privilege against self-incrimination. The Court of Appeals of this State is committed to the view that this cannot be done and in Matter of Grae, 282 N. Y. 428, 434-435, 26 N. E. 2d 963, 966, stated:

> "The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. 'It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.' Matter of Doyle, 257 N. Y. 244, 250, 177 N. E. 489, 491, 87 A. L. R. 418 Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in Matter of Ellis, 258 App. Div. 558, 572, 17 N. Y. S. 2d 800, 813, expressing the minority view at the Appellate Division: 'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.' "

In Matter of Kaffenburgh, 188 N. Y. 49, 53, 80 N. E. 570, 571, the Court of Appeals quoted with approval the follow-

ing language from People ex rel. Taylor v. Forbes, 143 N. Y. 219, 228, 38 N. E. 303, 305: "no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses, call witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as the court deems proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States.

The proceeding should be dismissed.

APPENDIX B

Grant of Stay of Disbarment by Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of January, 1960.

Present—Hon. Gerald Nolan, *Presiding Justice*,
" Philip M. Kleinfeld,
" Marcus G. Christ,
" Nicholas M. Pette,
" Arthur D. Brennan,
Justices.

In the Matter of Albert Martin Cohen, an attorney,

Respondent.

Denis M. Hurley,

Petitioner.

Order on Motion for a Stay.

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the

charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and the respondent Albert Martin Cohen having filed an answer, herein, and after due deliberation having been had thereon, this court, by order dated and entered December 31st, 1959, having ordered that by reason of the misconduct established by the evidence the said Albert Martin Cohen be disbarred and removed from the office of attorney and counselor at law and that the name of said Albert Martin Cohen be struck from the roll of attorneys of the State of New York, etc., and the said respondent, Albert Martin Cohen, having moved for an order staying the operation of the order of disbarment herein pending the respondent's appeal to the Court of Appeals of the State of New York, and for such other and further relief as to the court may seem just and proper, and the said motion having come on to be heard by an order to show cause, dated January 8th, 1960.

Now on reading and filing said order to show cause, the affidavit of David F. Price, and the answering affidavit of Denis M. Hurley, and the said motion having been argued by Mr. David F. Price of Counsel for respondent, and argued by Mr. Michael Caputo of Counsel for petitioner, and due deliberation having been had thereon:

It is Ordered that the said motion to stay the operation of the order of disbarment entered December 31, 1959, pending appeal to the Court of Appeals, be and the same hereby is granted on condition that respondent be ready to argue or submit the appeal at the next term of the Court of

Appendix B—Grant of Stay of Disbarment by Appellate Division

Appeals, and this court hereby certifies that a constitutional question is directly involved and, therefore no undertaking is required as a condition to the granting of this stay (cf. Civ. Prac. Act, Sections 598-a, 593).

Enter:

JOHN J. CALLAHAN
Clerk.

APPENDIX C

Opinions of Court of Appeals of New York

STATE OF NEW YORK
COURT OF APPEALS

No. 30

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Appellant,

DENIS M. HURLEY,

Respondent.

DESMOND, *Ch. J.*:

By an order of the Appellate Division, Second Department, one justice dissenting, petitioner admitted to the bar in 1922 has been disbarred from the practice of law. The disbarment order was made after a hearing and on findings that he had refused to answer pertinent questions put to him during a "Judicial Inquiry and Investigation" (Judiciary Law, § 90) ordered by the Appellate Division and held before a Supreme Court Justice assigned by that court, into charges of alleged illegal, corrupt and unethical practices and of alleged conduct prejudicial to the administration of justice, by attorneys and others acting with them, in the County of Kings, where appellant had his law office. Appellant's refusal to answer was on the stated ground that

the answers might tend to incriminate him. On this appeal he argues that the disbarment order was, contrary to law and in violation of his right to due process of law, made solely because of his refusing to answer questions, in good faith reliance on his constitutional privilege (N. Y. Const., art. I, § 6) against self incrimination. The Appellate Division held that he was not disciplined for invoking his constitutional privilege but because, in his capacity and status as a lawyer, he had deliberately breached his inviolable and absolute duty to co-operate with the court in a valid and proper investigation of unethical practices. "A lawyer" wrote the Appellate Division "cannot remain mute, thereby sterilizing the power of the court and frustrating its inquiry."

There is no dispute as to the facts and no real dispute as to the legality of this kind of general investigation or "Judicial Inquiry" (Judiciary Law, § 90; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465). On two occasions appellant appeared before the Supreme Court Justice presiding at the Inquiry. He was represented by his own counsel. The counsel for the Inquiry explained the nature of and authority for the Inquiry. Appellant and his attorney were informed by the Inquiry's counsel and by the court that this was an investigation and not an adversary proceeding (see *Anonymous* v. *Baker*, 360 U. S. 288, 291; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479, *supra*), that there were no respondents or defendants, that appellant was "not being charged with anything" but was to be questioned as to pertinent facts "within the scope of the Inquiry" and which were thought "to bear on or

relate to your professional conduct", also that counsel for the Inquiry had "information that indicates your participation in professional misconduct".

Counsel for the Inquiry then put into evidence 228 "Statements of Retainer" which during the years 1954 through 1958 appellant had filed with the Appellate Division in obedience to its Special Rule 3 which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the court and, if he enters into five or more such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained. Put into evidence, also, when appellant appeared before the Judicial Inquiry were 76 other such Statements of Retainer filed during the same period by the law firm of Cohen & Rothenberg, with which appellant apparently had some association. Counsel for the Inquiry informed appellant and the court that all these Retainer Statements were offered in evidence "as a basis for some of the questions to follow".

Appellant answered a few preliminary questions as to how long and where he had practised law. About sixty other questions were asked of him during the two days (six months apart) on which he was on the witness stand but, on advice of his counsel who was present in court, he refused to answer any of them (except questions as to whether he had failed in any case to comply with Special Rule 3 and except as to questions about maintaining a separate office bank account) on the ground that answers might tend

to incriminate or degrade him or expose him to a penalty or forfeiture. Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the cases described in his Statements of Retainer, to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any "lay person" 10% of recoveries or settlements. He was asked—and refused to answer—as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid non-lawyers to arrange settlements of his cases with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-A and 270-D of the Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors. At one stage of this questioning counsel for the Inquiry pointedly called to appellant's attention section 90 of the Judiciary Law which gives the Appellate Divisions power and control over lawyers and authority to punish professional misconduct or conduct prejudicial to the administration of justice. At that time the Inquiry's counsel cited Canon 22 of Professional Ethics requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with others lawyers; also sections 270-A, 270-B, 270-C, 270-D and 276 of the New York Penal

Law, all relating to soliciting and fee splitting. Counsel for the Inquiry warned appellant and his counsel that "serious consequences" might flow from his refusal to answer by way of a "recommendation to the Appellate Division." Appellant's counsel replied that he was relying on *Matter of Grae* (282 N. Y. 428) and *Matter of Ellis* (282 N. Y. 435), as holding that there could not be any "consequences" to lawyers for "doing what they had an absolute legal right to do". Appellant was given a further opportunity to answer but persisted in his refusal, all this being admitted in his pleading in this proceeding.

The Supreme Court Justice presiding at the Judicial Inquiry then filed with the Appellate Division a transcript of the proceedings before him with a recommendation that disciplinary proceedings be instituted against appellant. The Appellate Division directed respondent Hurley, counsel to the Inquiry, to commence this disbarment proceeding. Appellant's answer says that there is only an issue as to whether he was within his rights under article I, section 6, New York State Constitution, in pleading the privilege. The case, however, is not so simple. Of course, he had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity (*Matter of Ellis*, 282 N. Y. 435, *supra*). But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar (see Judge Cardozo in *Matter of Rouss*, 222 N. Y. 81, 84). "Whenever the condition is broken the privilege is lost" (*Matter of Rouss*,

supra). Appellant as a citizen could not be denied any of the common right of citizens. But he stood before the Inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was "an officer of the court, and like the court itself, an instrument of justice" (Chief Judge Cardozo in *People ex rel Karlin* v. *Culkin*, 248 N. Y. 465, 470, *supra*), with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-operate. Such "co-operation" is a "phrase without reality" as Chief Judge Cardozo wrote in *People ex rel. Karlin* v. *Culkin* (*supra*), if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court.

The solution to our problem is clear when we consider the lawyer's special position. "The court's control over a lawyer's professional life derives from his relationship to the court" (*Theard* v. *United States*, 354 U. S. 278, 281). "Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss*, 221, N. Y. 81, 84, *supra*). Those conditions must not be arbitrary but the proper and appropriate ones are numerous. An attorney's contractual right to collect as fees a percentage of settlements or recoveries may validly be limited by court rule (*Gair* v. *Peck*, 6 N. Y. 2d 97, certiorari denied 361 U. S. 374). He may be required to represent, without fee, indigent defendants. He cannot solicit retainers or employ others to solicit them for him, or divide his fees with laymen (Penal Law, §§ 270-A, 270-B,

270-C, 270-D, 276). If he know of such practices by others, he must inform the court (Canon 29). He must be candid and frank with the court at all times (Canon 22). Not only must he meet educational requirements and prove his character and fitness before being admitted to the bar but he is subject throughout his professional life to investigation as to whether he continues in the possession of those qualities (Judiciary Law, § 90).

The key word is "duty" and the imposition on a lawyer by tradition and positive law of strict and special duties produces this situation where, at the very time that he is exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life. Breach of the special duty brings a special penalty. Lawyers are not the only citizens whose duty to answer is inconsistent with the exercise of the constitutional privilege. So it is with police officers (*Christal* v. *Commissioners*, 33 Cal. App. 2d 564; *Cantelinę* v. *McClellan*, 282 N. Y. 166) and with certain other public employees (*Lerner* v. *Casey*, 2 N. Y. 2d 355, affd. 357 U. S. 468; *Beilan* v. *Board*, 357 U. S. 399). The latest in this line of decisions is *Nelson* and *Globe* v. *County of Los Angeles* (— U. S. —, decided February 29, 1960, 28 Law Week 4159). Nelson and Globe had been ordered by their employer, the County, to answer any questions asked of them by a Congressional subcommittee before which they had been subpoenaed. There was a California statute making it the duty of any public employee so subpoenaed to answer any questions as to his membership in any organization advocating the forceful

overthrow of the United States Government, etc. Nelson and Globe refused to answer the subcommittee's questions on Fifth Amendment grounds and they were thereupon discharged from their County employment. The United States Supreme Court, following *Beilan* and *Lerner* (*supra*) held that they had been validly separated from their employment not for invoking their constitutional privilege but for insubordination under California law. The majority opinion in the Supreme Court stated that if these men had simply refused without more to answer the subcommittee's questions, the County could certainly have discharged them and the fact that they chose to place their refusal on a Fifth Amendment claim put the matter in no different posture since their assertion of that claim was not used as a basis for drawing an inference of guilt. In those cited cases the duty to co-operate in investigations by answering relevant questions was found in statutes or constitutions. The lawyer's duty is found elsewhere—in the common law and in the Canons of Ethics—but it is just as plainly written. In this State a lawyer on admission to the bar takes the same oath as does a public official (see Judiciary Law, § 466).

The idea that invocation of basic constitutional rights may result, for other reasons, in forfeiture of office or privilege is not a new one. Justice Holmes' aphorism has become famous: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (*McAuliffe* v. *New Bedford*, 155 Mass. 216). The Federal Hatch Act, denying to governmental employees their right of political activity, on pain of dismissal,

has been held valid (*United Public Workers* v. *Mitchell*, 330 U. S. 75).

Appellant's reliance is on *Matter of Grae* (282 N. Y. 647, *supra*); *Matter of Ellis* (282 N. Y. 435, *supra*); *Matter of Solovei* (276 N. Y. 647) and *Matter of Kaffenburgh* (188 N. Y. 49). None of those decisions controls us here. The precise question in *Grae* and *Ellis* (*supra*) was as to whether a lawyer who offered to answer all pertinent questions could be compelled in such an investigation to waive immunity in advance of questioning. The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. *The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented.* Likewise as to *Kaffenburgh* and *Solovei* (*supra*): Kaffenburgh's refusal to testify was at a criminal trial (so in *Matter of Cohen*, 115 App. Div. 900) and Solovei's was before a grand jury. Our present appellant by declining to answer may have escaped criminal prosecution and punishment, but he could never, while a member of the bar, escape the other consequences of his flagrant breach of his absolute duty to the court whose officer he was. That breach was in itself "professional delinquency" (*Ex Parte Garland*, 71 U. S. 339, 379) and a valid reason for depriving appellant of his office as attorney.

The order appealed from should be affirmed.

COURT OF APPEALS

In the Matter of

ALBERT MARTIN COHEN, an Attorney,

Appellant,

DENIS M. HURLEY,

Respondent.

FULD, J. (dissenting):

In order to appreciate the force of today's decision, it must be borne in mind that we are concerned not with the necessarily vague contours of the Due Process Clause of the Federal Constitution, but with the specific provision of the Constitution of this State that no person shall be compelled to be a witness against himself (Art. 1, § 6). Recent Supreme Court decisions (*Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board*, 357 U. S. 399; and *Nelson & Globe* v. *County of Los Angeles*, decided Feb. 29, 1960, U. S.), whatever their bearing on the present problem, are, therefore, not dispositive of this case. In other words, whether or not this disbarment violates federal constitutional guarantees—and for reasons previously expressed (e.g., *Matter of Lerner* v. *Casey*, 2 N Y 2d 355, 373, dissenting), I believe that it does—we need not resolve the federal question. The case before us may and should be decided, as were *Matter of Grae* (282 N. Y. 428) and *Matter of Ell* (282 N. Y. 435), on an interpretation of our own Constitution, Article 1, section 6.

I agree that "strict and special duties" have been imposed on a lawyer (Opinion, p. 6). I cannot, however, persuade myself that a lawyer's refusal to answer questions, even before a judicial inquiry, on the constitutionally permissible ground that to do so would incriminate him, may be said to constitute a violation of any such duty. (See *Matter of Grae*, 282 N. Y. 428, *supra; Matter of Ellis*, 282 N. Y. 435, *supra;* see, also, *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 471.) In the *Grae* and *Ellis* cases, the court held that under our State Constitution an attorney's refusal to sign a waiver of immunity—his refusal to forego reliance on the privilege—could not constitute a ground for disbarment, even though the refusal occurred during the course of a judicial inquiry similar to the one involved here.[1] There, too, it was argued that failure to answer was a violation of the lawyer's duty of cooperation with the court. We answered that argument, in a unanimous opinion, in the words of Presiding Justice Lazansky who had dissented in the Appellate Division (282 N. Y., at p. 435):

> "'The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.'"

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1. Indeed, in the *Ellis* case (282 N. Y. 435, *supra*), the court pointed out that Ellis, "appearing as a witness at the inquiry, not only declined to sign a waiver of immunity * * * but in addition * * * declined to answer any questions upon the ground that such answers would tend to incriminate or degrade him" (p. 437; see, also, 258 App. Div., at p. 559). Although Ellis later wrote a letter stating that, while he stood upon his refusal to sign a waiver, he was "willing" to answer questions put to him, the significant fact is that he never did appear as a witness and that his refusals to answer questions on the ground of self-incrimination went unpunished.

And, therefore, concluded the court (p. 435),

> "It follows that * * * the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable."

The attorneys Grae and Ellis ultimately offered to answer all questions put to them, but, the record makes clear, the offer was based not on a surrender of immunity, but on the specific condition that immunity be granted—by their being compelled to answer questions that might incriminate them. It was for the very reason that the court was unwilling to have immunity conferred on them that it declined to put questions to them without first obtaining a waiver of immunity. Analysis of our opinion, as well as the dissent of Presiding Justice Lazansky (258 App. Div., at pp. 567-575) —which this court explicitly approved (282 N. Y., at p. 434) —demonstrates that the court was not merely passing on the consequences of a momentary lapse of courtesy, but was deciding the very point in issue today. Pointedly noting that "the single offense charged [against Grae] is his refusal to yield a constitutional privilege", the court unequivocally announced that "its exercise cannot be a breach of duty to the court" (282 N. Y., at p. 435).

The attorneys who refused to sign waivers of immunity in those proceedings were not, I am confident, any more cooperative or any more mindful of their "strict and special duties" or of their privileged posts in the affairs of men than the present appellant. And, I venture, the motives which prompted Grae and Ellis to assert their privilege were no different from those of the appellant.

Matter of Grae and *Matter of Ellis* do not stand alone.

The question now before us first came to this court in 1907 in *Matter of Kaffenburgh* (188 N. Y. 49). Kaffenburgh was called as a witness on the trial of his employer for conspiracy to obstruct justice. He was asked questions relating to his possible participation in the conspiracy and declined to answer on constitutional grounds. This was one of the charges on which his disbarment was later sought, and as to it this court wrote (p. 53): "The defendant * * * had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself or a forfeiture of his office of attorney and counselor at law. * * * We are therefore of the opinion that no offense was stated in the first charge." The court's opinion herein attempts to distinguish *Kaffenburgh* upon the ground that it involved a trial and not an inquiry into the conduct of lawyers. In point of fact, it was the most serious kind of inquiry into the conduct of lawyers, taking the form of a criminal prosecution. The questions put to Kaffenburgh dealt solely with his conduct in the practice of the law and, certainly, he was as much an officer of the court conducting the trial as the appellant here is of the court conducting the judicial inquiry.

Ten years later came *Matter of Rouss* (221 N. Y. 81), also cited by the majority. That decision, far from overruling *Kaffenburgh* on this point, actually confirmed it, for the court explicitly declared that "the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court" (p. 90).

Twenty years after *Rouss* came *Matter of Solovei* (276 N. Y. 647, affg. 250 App. Div. 117). As a result of asserted irregularities in connection with a murder investigation in which the respondent therein represented one of the suspects, the Governor appointed an Extraordinary Special and Trial Term of the Supreme Court and a grand jury was drawn for that term. It indicted three persons for murder and, some time later, it also indicted certain other persons, including an office associate of the respondent, for the crime of conspiracy to obstruct justice. The respondent, named as a coconspirator, declined to waive immunity when questioned by the grand jury. That body thereupon presented charges to the Appellate Division. That court dismissed the charges, stating that "*Matter of Kaffenburgh* • • • decided that an attorney who in good faith refused to answer questions on the ground that they might tend to incriminate him was not amenable to disciplinary proceedings" (250 App. Div., at p. 121). The Appellate Division also commented on the nature of the proceedings, noting that, if it was not a breach of duty to the court to refuse to cooperate with it in a public trial, as in *Kaffenburgh*, it was surely no breach to claim the privilege in a private hearing (p. 120). As indicated, we affirmed without opinion.

Although the court in this case places considerable reliance upon *People ex rel. Karlin* v. *Culkin* (Opinion, p. 5), it is noteworthy that the case did not involve a claim of privilege; the attorney simply refused to be sworn or testify. The court spoke of the duty of "co-operation" owed by an attorney in an inquiry such as the present, but it was careful to indicate that such "co-operation" on the part of

the lawyer was "subject to his claim of privilege" (248 N. Y., at p. 471).

It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplinary authority powerless or a guilty attorney immune. If, as counsel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's "participation in professional misconduct", his unwillingness to furnish information might have justified institution of a disciplinary proceeding founded on such information. And, if such proceeding were to be brought and the appellant were to stand mute therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant that, where immunity is conferred—by overriding the claim of privilege and compelling the witness to answer the questions—and the testimony shows that he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See *Matter of Rouss*, 221 N. Y. 81, 86 et seq., *supra*.)

In the present case, however, the appellant's claim of privilege was the sole ground relied upon to disbar him, and this fact cannot be altered or disguised by styling his conduct a "refusal to cooperate with the court". It is to substance that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right.

To the charge that it is unthinkable that a lawyer "can retain his status and privileges as an officer of the court" after claiming his privilege (Opinion, p. 5), I would answer

in the words of Mr. Justice Lazansky in his dissent in *Matter of Ellis* (258 App. Div. 558, 572, *supra*) —to which I adverted above—that the charge "is based upon false assumption. Defiance and affront there cannot be when the act has the sanction of the fundamental law of the land". It is, in short, my view that not only Article 1, section 6, of our Constitution but the decisions of this court considering and construing it require us to set aside the order of disbarment. Failure to do so can only mean that time has eroded the importance and vitality of the constitutional privilege against self-incrimination.

I would reverse the order of the Appellate Division.

Order affirmed, without costs. Opinion by Desmond, Ch. J.

All concur except Fuld, J., who dissents in an opinion.

APPENDIX D

Amended Remittitur of Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-first day of April A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No 275

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Appellant,

DENIS M. HURLEY,

Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: "The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in an non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment." The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated.

AND the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, is hereby requested to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

APPENDIX E

Order of Disbarment

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 31st day of December, 1959.

Present:

Hon. GERALD NOLAN,
Presiding Justice,
" HENRY G. WENZEL, JR.,
" GEORGE J. BELDOCK,
" HENRY L. UGHETTA,
" PHILIP M. KLEINFELD,
Justices.

In the Matter of

ALBERT MARTIN COHEN, an attorney,

Respondent.

DENIS M. HURLEY,

Petitioner.

ORDER OF DISBARMENT

A proceeding having been instituted by Denis M. Hurley, Esq., by petition verified the 9th day of July, 1959, for an

order directing that the respondent Albert Martin Cohen (admitted Second Judicial Department on December 6th, 1922), be disciplined upon the charges set forth in said petition, and for such other and further action upon the charges embodied in said petition, as justice may require, and for such other and further relief in the premises as may be just and proper, and respondent Albert Martin Cohen having filed an answer verified July 31st, 1959, and the said proceeding having come on to be heard by an order to show cause, dated July 13, 1959:

Now on reading and filing said order to show cause, the petition, the answer, respondent's brief and respondent's reply brief, the exhibits, the testimony of respondent before the Additional Special Term, and all the papers filed herein, and Mr. Denis M. Hurley, petitioner, appearing in person, and Mr. David F. Price appearing for respondent, and due deliberation having been had thereon; and upon the majority opinions of the court herein, heretofore filed:

It is Ordered that by reason of the misconduct established by the evidence, the said Albert Martin Cohen, be and he hereby is disbarred and removed from the office of attorney and counselor at law, and the name of said Albert Martin Cohen ordered struck from the roll of attorneys of the State of New York as of the date of entry of this order, and it is

Further Ordered, pursuant to the appropriate provisions of the Judiciary Law of the State of New York, that the said Albert Martin Cohen is hereby commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and

is forbidden to appear as attorney and counselor at law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law or its application or any advice in relation thereto, and it is

Further Ordered that the respondent, Albert Martin Cohen, have leave to apply to vacate this order upon proof, that, within 30 days after the entry of this order, he has answered before the Justice presiding at the judicial inquiry all relevant questions and has produced before such Justice all relevant records in accordance with the subpoena duces tecum.

Opinion by Beldock, *J.* Wenzel and Ughetta, *JJ.*, concur with Beldock, *J.*, Nolan, *P.J.*, concurs in separate opinion; Kleinfeld, *J.*, dissents and votes to dismiss the proceeding, in opinion.

Enter

JOHN J. CALLAHAN
Clerk